Supreme Court, U.S.
FILED
04 300 AUG 2 8 2004
OFFICE OF THE CLERK

NO.:

IN THE
SUPREME COURT OF THE UNITED STATES

RICKY LEE BYNAM,
PETITIONER

v.

INTERMET MACHINING.,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
CASE NO. 03-15051-JJ

PETITION FOR A WRIT OF CERTIORARI

PETER A. DUMBUYA
Counsel of Record
P. O. BOX 3302
PHENIX CITY, ALABAMA 36867
(706) 289-5082

DANA P. GENTRY
Counsel of Record
1507 BROAD STREET
PHENIX CITY, ALABAMA 36867
(334) 297-5640

QUESTIONS PRESENTED

On September 24, 2001, Petitioner, *pro se*, filed suit against Respondent, Intermet Machining, seeking damages for wrongful termination from employment because of his race (African American) and disability in violation of Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act ("ADA") respectively. On August 22, 2002, the District Court dismissed Petitioner's original complaint due to the inability of Petitioner's counsel to associate with local counsel. Bynam refiled the complaint on September 4, 2002, after local counsel had been retained.

The question presented is whether the 90-day statute of limitations of Title VII of the Civil Rights Act of 1964 and the ADA should have been equitably tolled when the District Court dismissed Petitioner's original complaint even though Petitioner's counsel had filed a *pro hac vice* petition with the District Court.

PARTIES TO THE PROCEEDING

Petitioner, Ricky Lee Bynam, states that he is a private citizen who is not affiliated with any corporation or publicly held company.

Respondent, Intermet Machining, states that it is a publicly held company, and that no other publicly held company owns 10% or more of Intermet Machining's stock.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of The Case	2
Reasons for Granting the Writ	4
I. The Decision Below Overlooked Two *Pro Hac Vice* Petitions Filed By Petitioner's Counsel	5
II. Certiorari Is Warranted Because The Decision Below Conflicts With Decisions of This Court and Of Other Circuits	8
Conclusion	18

TABLE OF CITED AUTHORITIES

Cases: **Page**

Alsaras v. Dominick's Finer Foods, Inc., 2000 U.S. App. LEXIS 30183 (7th Cir. 2000) 17

Armstrong v. Martin Marietta Corp., No. 95-3255, _ F.2d _ (11th Cir. 1996) 10

Davis v. Bryan, 810 F.2d 42 (2nd Cir. 1987) . . . 17

Graham-Humphreys v. Memphis Brooks Museum of Art, Inc., 209 F.3d 552 (6th Cir. 2000) 12

Hishon v. Viking & Spalding, 467 U.S. 69, 104 S.Ct. 2229, 81 L. Ed.2d 59 (1984) 8

Johnson v. Railway Express Agency, Inc., 489 F.2d 525 (6th Cir. 1973) 9

Jordan v. Lewis Grocer Co., 467 F. Supp. 113 (1979) 9

Marsh v. Soares, 223 F.3d 1217 (10th Cir. 2000) . 11

McClain v. Mack Trucks, Inc., 81 F.R.D. 730 (E.D. Pa. 1979) 15

Nilsen v. City of Moss Point, Miss., 701 F.2d 556 (5th Cir. 1983) 10

Nottelson v. A.O. Smith Corp., 423 F. Supp. 1345 (E.D. Wisc. 1976) 12

Price v. Southwestern Bell Telephone Co., 687 F.2d 74 (5th Cir. 1982) 17

Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L. Ed.2d 90 (1974) 8

Truitt v. County of Wayne, 148 F.3d 644 (6th Cir. 1998) 11

U.S. v. Glenn, ___ 01-5138 ___ (N.D. Ok. 2003). 12

Venters v. City of Delphi, 123 F.3d 956 (7th Cir. 1997) 17

Williams v. Sears, Roebuck and Co., 143 F. Supp.2d 941 (W.D. Ten. 2001) 12

Woodward v. Williams, 263 F.3d 1135 (10th Cir. 2001) 11

Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 102 S.Ct. 1127, 71 L. Ed.2d 234 (1982). 16

STATUTES:

42 U.S.C. §2000e et seq 2, 3, 5, 7, 15

42 U.S.C. §12181 et seq 2, 3, 5

28 U.S.C. §1254(1) 1

TABLE OF APPENDICES

Page

Appendix A---Opinion and Order of the United States District Court for the Middle District of Georgia, Columbus Division and filed September 10, 2003 . . . . . 1a

Appendix B---Opinion of the United States Court of Appeals for the Eleventh Circuit and Decided March 5, 2004 . 11a

Appendix C—Order Denying Petition for Rehearing and filed June 3, 2004 . . . . . 25a

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Opinion and Order of the United States District Court for the Middle District of Georgia, Columbus Division, (per Land, Clay D., D. J.) granting Respondent's motion for Judgment on the Pleadings (Appendix ("Pet. App.") 1a-10a) is not otherwise published. The opinion of the Court of Appeals (per Curiam) (Pet. App. 11a-24a) is not otherwise published. The Court of Appeals' Order denying rehearing and rehearing *en banc* (Pet. App. 25a-26a) is not otherwise published.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its Opinion and Order on March 5, 2004, and denied rehearing and rehearing *en banc* on June 3, 2004. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, and the Americans With Disabilities Act, 42 U.S.C. §12181 *et seq.*

STATEMENT OF THE CASE

On May 10, 1999, Bynam sustained injuries arising out of and in the course of his employment with his employer Intermet Machining. He became disabled as a result of the injuries he sustained and was unable to perform essential functions as a machine operator. Bynam filed a workers' compensation claim with the State of Georgia Board of Workers' Compensation.

During the pendency of Bynam's compensation claim, Intermet Machining terminated his employment on November 4, 1999. On June 2, 2000, Bynam filed a charge with the District Office of the Equal Employment Opportunity Commission (EEOC), alleging unlawful employment practice committed against him because of his race and his disability

resulting from injuries sustained while in the course of his employment with Intermet Machining. The EEOC determined that Bynam timely filed his charge of discrimination. Bynam received a "Notice of Suit Rights" (dated 21 June, 2001) on June 25, 2001, entitling him to institute a civil action with respect to the charge within 90 days of the date of the receipt of said Notice.

On September 24, 2001, Bynam, *pro se*, filed suit against Intermet Machining seeking damages for wrongful termination from employment because of his race (black/African American) and disability in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e *et seq.*, and the Americans With Disabilities Act, 42 U.S.C. §12181 *et seq.*

On August 22, 2002, the District Court dismissed the original complaint without prejudice because, it argued in footnote 2, that plaintiff's counsel failed to seek admission, *pro hac vice* or otherwise associate with local counsel. Bynam re-

filed the complaint on September 4, 2002, after local counsel, Hon. Dana P. Gentry, had been retained. On September 10, 2003, the District Court entered an order granting Intermet Machining's motion for judgment on the pleadings under Rule 12(c) of the FRCP. Bynam appealed.

On March 5, 2004, the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court. On June 3, 2004, the Eleventh Circuit Court of Appeals denied Bynam's petition for rehearing and rehearing *en banc*. This petition followed.

REASONS FOR GRANTING THE WRIT

The petition should be granted for the following reasons. First, the judgment of the Eleventh Circuit clearly overlooked the two *pro hac vice* petitions filed by petitioner's counsel in this case. This is in stark contrast to the Court's affirmation of the District Court's judgment that petitioner's counsel failed to seek admission, *pro hac vice*, or otherwise. Pet. App. 4a, n 2). While the *pro hac vice* petitions were on

file, petitioner's counsel made diligent efforts to locate and retain local counsel.

Second, the Eleventh Circuit's decision not only conflicts with holdings of other circuits in the application of the doctrine of equitable tolling to employment and disability discrimination cases, bust also raises novel issues as to when a District Court can dismiss a timely filed complaint when petitioner's counsel is trying to locate and retain local counsel.

I.

ARGUMENTS AND AUTHORITIES

I: The Decision Below Overlooked The Two *Pro Hac Vice* Petitions Filed By Petitioner's Counsel

On September 24, 2001, Bynam, *pro se*, commenced this action against Intermet Machining for wrongful termination from employment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, and the Americans With Disabilities Act, 42 U.S.C. §12181 *et seq.*

On August 22, 2002, the District Court dismissed the original complaint without prejudice to reinstatement because

of an alleged failure by Bynam's attorney to seek admission to the District Court, *pro hac vice* or otherwise associate with a local attorney as required by local rules. Bynam re-filed the complaint on September 4, 2002, after local counsel, Hon. Dana P. Gentry, had completed his application for admission to the District Court. On September 10, 2003, the District Court entered an order granting Intermet Machining's motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure.

On November 19, 2001, and again on September 12, 2002, Bynam's attorney was properly admitted to the District Court *pro hac vice*. The District Court's Civil Docket for the case contains an entry, dated September 12, 2002, noting the fact that Bynam's attorney was properly admitted to the District Court with payment of the *pro hac vice* admission fee of $50.00.

Furthermore, Bynam's attorney made diligent efforts to retain local counsel all to no avail. At the time when Hon. Dana P. Gentry consented to association as local counsel, he

had not yet been admitted to practice before the District Court even though he was licensed to practice in the State of Georgia. In order to speed up the admission process, Bynam's attorney paid the admission fee and forwarded the application materials to the District Court's Macon office by Federal Express mail.

Therefore, the 90-day statute of limitations under 42 U.S.C. §2000e-5(f)(1) was tolled when Bynam filed and then re-filed the complaint because of an error on the part of the District Court in dismissing the original complain in the first place. The problems which led to the dismissal of Bynam's original complaint were not the result of inaction on Bynam's part. Moreover. adequate notice was provided to Intermet Machining by the original complaint and the District Court's dismissal of that complaint without prejudice to reinstatement.

In light of the above, Bynam's original complaint should not have been dismissed by the District Court. Once dismissed, however, the statute of limitations should have been equitably tolled.

II. Certiorari Is Warranted Because The Decision Below Conflicts With Decisions of This Court And Of Other Circuits.

Under Rule 12(c) of the Federal Rules of Civil Procedure (FRCP), a court can dismiss a complaint for failure to state a claim under which relief can be granted. The factual allegations in a complaint must be taken as true and viewed in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L. Ed.2d 90 (1974).

In addition, the reviewing court does not have to accept any legal conclusions alleged in plaintiff's complaint. However, dismissal of the allegations contained in the complaint is appropriate only if it appears beyond doubt that plaintiff can prove no set of facts in support of a claim that would entitle her to relief. *Hishon v. King Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984).

On September 24, 2001, Bynam, *pro se*, filed the original complaint asserting Title VII and ADA claims

against Intermet Machining. Bynam received the "Notice of Suit Rights," dated June 21, 2001, on June 25, 2001. Bynam's clams are not time-bared simply because he filed suit on September 24, 2001. In fact, September 23, 2001, the ninetieth day from the time the plaintiff received the "Notice of Suit Rights" fell on a Sunday. Under Rule 6(a) of the FRCP, the plaintiff timely filed his suit on Monday, September 24, 2001. *Jordan v. Lewis Grocer Co.*, 467 F. Supp. 113 (1979).

Furthermore, after the District Court dismissed the original complaint without prejudice to reinstatement on August 22, 2002, Bynam re-filed the complaint on September 4, 2002, less than 30 days after dismissal. In *Johnson v. Railway Express Agency, Inc.*, 489 F.2d 525 (6th Cir. 1973), the Court dismissed without prejudice to reinstatement Willie Johnson's original complaint, and ordered him to obtain a new attorney or have his suit

dismissed without prejudice. Although Johnson failed to re-file his suit in 30 days, the Sixth Circuit Court of Appeals held that the District Court was correct in ordering Johnson to file the new case within 30 days at a minimum. The 90-day statute of limitations was tolled when the Court dismissed the original complaint without prejudice to reinstatement and ordered Johnson to obtain a new attorney.

Here, as in *Armstrong v. Martin Marietta Corp.*, No. 95-3255, ____ F.2d ____ (11th Cir. 1996), the Court dismissed the plaintiff's case without prejudice, and without adjudication on the merits. *Nilsen v. City of Moss Point, Miss.*, 701 F.2d 556 (5th Cir. 1983). The plaintiffs refiled their class action suit more than 90 days after the Court's order of dismissal. The 11th Circuit Court of Appeals held that the order of dismissal without prejudice was not a final judgment under Rule 54(b) of the FRCP, and that the tolling of the 90-day statute of limitations of Title VII remained

tolled when the Court dismissed the original complaint. In this case, petitioner refiled the complaint on September 4, 2002, less than 30 days after the Court's order of dismissal during which the statute of limitations remained tolled pursuant to *Johnson* and *Armstrong*.

The applicability of equitable tolling must necessarily be undertaken on a case-by-case basis. *Truitt v. County of Wayne*, 148 F.3d 644 (6th Cir. 1998). Title VII's and the ADA's statute of limitations is subject to equitable tolling only when a complainant such as Bynam diligently pursues his claims and demonstrates that the dismissal of the original complaint was caused by extraordinary circumstances beyond his control, *Marsh v. Soares*, 223 F.3d 1217 (10th Cir. 2000), *cert denied*, 121 S.Ct. 1195 (2001), *Woodward v. Williams*, 263 F.3d 1135 (10th Cir. 2001), or by procedural fault on the part of the District

Court. *Nottelson v. A.O. Smith Corp.*, 423 F.Supp. 1345 (E.D. Wisc. 1976).

Among the factors to be considered in determining the appropriateness of equitably tolling a statute of limitations are diligence in pursuing one's rights, and absence of prejudice to the defendant. *Williams V. Sears, Roebuck and Co.*, 143 F. Supp. 2d 941 (W.D. Ten. 2001), citing *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552 (6th Cir. 2000). In considering the issue of equitable tolling, this Court must also assume the truth of Bynam's assertion that the undersigned counsel was duly admitted in the District Court *pro hac vice*, and that he made diligent efforts to retain local counsel. *U.S. v. Glenn*, _ 01-5138 ___ (N.D. Ok. 2003). Respondent has not shown that it would be prejudiced by the tolling of the statute of limitations. In light of the facts presented in this case, equity demands an evaluation and reversal of the Eleventh Circuit's

opinion affirming the District Court's order dismissing Bynam's original complaint in August 2002.

The original complaint should not have been dismissed because Bynam's counsel was properly admitted *pro hac vice* to the District Court, Bynam was diligent in pursuing his rights, and Intermet Machining offered no proof that it had been prejudiced. On November 19, 2001, and again on September 12, 2002, Bynam's counsel properly filed petitions for admission to plead and practice *pro hac vice* in the District Court. The District Court's Civil Docket for the case includes an entry, dated September 12, 2002, noting the fact that Bynam's counsel was properly admitted to the District Court with payment of the admission fee of $50.00.

Furthermore, Bynam's counsel made diligent efforts to retain local counsel. During the pre-trial conference on August 15, 2002, Bynam's counsel informed the District

Court of efforts being made to associate local counsel, including, among others, Hon. Robert D. Wilson and Hon. Pete Quezada both of Columbus, Georgia. For various reasons, none of the counsel contacted expressed a willingness to associate with Bynam's counsel.

At the time when Hon. Dana P. Gentry consented to associate with Bynam's counsel, the clerk of the District Court in Columbus, Georgia, informed Bynam's counsel that Hon. Gentry had not yet been admitted to practice before the District Court. In order to speed up the admission process, the undersigned counsel paid the admission fee and forwarded the application for admission to the District Court's Macon office by Federal Express mail. The District Court dismissed the original complaint before the District Court clerk had processed Hon. Dana P. Gentry's application for admission.

The facts of this case, therefore, warrant the equitable tolling of the statute of limitations under Title VII and the ADA. The District Court's dismissal of Bynam's original complaint was clearly erroneous, and was not the result of inaction on Bynam's part. Moreover, Intermet Machining was not prejudiced by the dismissal. In fact it received adequate notice of the action by the timely filing of the charge with the EEOC, the original complaint, and by the District Court's dismissal of that complaint without prejudice to reinstatement.

In *McClain v. Mack Trucks, Inc.*, 81 F.R.D. 730 (E.D. Pa. 1979), McClain sued his former employer, Mack Trucks, Inc., alleging, *inter alia*, harassment and discharge from employment because of race. In dismissing the complaint because it was not filed within the 90-day period provided by 42 U.S.C. §2000e-5(f), the Court held that: "However, significantly, he did not file the complaint within

ninety days of the dismissal without prejudice. This he could have done." Id at 732. In the case *sub judice*, Bynam re-filed the complaint less than two weeks after the dismissal of the original complaint. Therefore, the 90-day statute of limitations was tolled when Bynam filed and then re-filed the complaint because of an error on the part of the District Court.

In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982), female flight attendants brought suit against Trans World Airlines, Inc., alleging unlawful sex discrimination in violation of Title VII of the Civil Rights Act of 1964 by its policy of grounding all female flight cabin attendants who became mothers; male counterparts who became fathers were allowed to continue flying. The Court held that filing a timely charge of discrimination with the EEOC is a requirement that, like a statute of limitations, is subject to waiver, estoppel, and

tolling when equity so requires. The facts of the case *sub judice* warrant application of the doctrine of equitable tolling to the 90-day statute of limitations for Bynam's Title VII and ADA claims. *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74 (5th Cir. 1982). See also *Alsaras v. Dominick's Finer Foods, Inc.*, 2000 U.S. App. LEXIS 30183 (7th Cir. 2000).

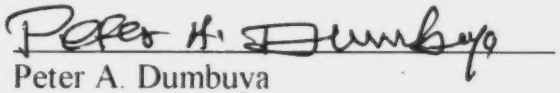
In *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997), the Seventh Circuit held that an affirmative defense predicated upon the statute of limitations must be pleaded in the answer to the complaint, that the defendant remains obligated to act in a timely fashion, and that "A defendant should no be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense." Citing *Perez v. united States*, 830 F.2d 54, 57 (5th Cir. 1987), and *Davis v. Bryan*, 810 F.2d 42 (2nd Cir. 1987). In this case, respondent raised the statute of limitations defense in the motion for judgment

on the pleadings on August 12, 2003, three days before the pre-trial conference on August 15, 2003. A trial date had already been set by the District Court. Therefore, it was not appropriate for the District Court to grant respondent's motion for judgment on the pleadings when respondent invoked the statute of limitations in its brief to the Court.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,



Peter A. Dumbuya
Counsel of Record
P.O. Box 3302
Phenix City, AL 36867
(706) 289-5082

APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF GEORGIA

COLUMBUS DIVISION

RICKY LEE BYNAM,	*	
Plaintiff	*	
vs	*	CASE NO 4:02-CV-139-1
INTERMET MACHINING,	*	
Defendant	*	

ORDER

The Court presently has pending before it Defendant Intermet Machining's Motion for Judgment on the Pleadings. The Court finds that Plaintiff's federal law claims are barred by the applicable statute of limitations. Therefore, Defendant's Motion is granted as to those claims. The Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims, and those claims are dismissed without prejudice.

STANDARD OF REVIEW

Pursuant to Rule 12(c) of the Federal Rules of Civil Procedure, any party may move for judgment on the pleadings "[a]fter the pleadings are closed but within such time as not to delay the trial." Fed. R. Civ. P. 12 ©). "Judgment on the pleadings is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." *Cannon v. City of W. Palm Beach*, 250 F.3d 1299, 1301 (11th Cir. 2001). When reviewing a motion f or judgment on the pleadings, the court is bound to accept the facts in the plaintiff's complaint as true and to view those facts in the light most favorable to the nonmoving party. *Id.*

FACTS

Plaintiff Ricky Lee Bynam ("Bynam") was discharged from his employment with Defendant Intermet Machining ("Intermet") on November 4, 1999. At that time,

Bynam had a workers' compensation claim pending with the State of Georgia Board of Workers' Compensation, arising from injuries he suffered on May 10, 1999, while performing his duties as a machine operator for Intermet. On June 2, 2000, Bynam filed a charge with the Equal Employment Opportunity Commission ("EEOC"), alleging Intermet had discriminated against him based on his race and disability. The EEOC ultimately issued a Notice of Right to Sue on June 21, 2001. Bynam received this notice on June 25, 2001.

Bynam first filed a Complaint in this Court on September 24, 2001, asserting Title VII and ADA claims. *Bynam V. Intermet Machining*, No. 4:Ol-CV-l30-l (M.D. Ga. filed Sept. 24, 2001). Defendant Intermet does not dispute that this Complaint was timely filed within ninety days of Plaintiff receiving his right to sue notice.[1] See 42 U.S.C. §

---

1 September 23, 2001, the ninetieth day following Bynam's receipt of a right to sue letter, fell on a Sunday. Pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, Bynam therefore had

2000e-5(f) (1); *see also Zillyette* V. *Capital One Fin. Corp.*, 179 F.3d 1337, 1339 (11th Cir. 1999) (noting Title VII's procedural requirements apply equally to ADA claims). However, Bynam's original suit was subsequently dismissed on August 22, 2002.[2]

Plaintiff refiled his Complaint on September 4, 2002, which was beyond the ninety-day statute of limitations period for his federal claims. Intermet now seeks judgment on the pleadings as to Plaintiff's federal law claims based upon the

---

until Monday, September 24, 2001, to file a complaint before being time-barred from doing so. *See* Fed. R. Civ. P. 6(a).

2 The Court dismissed Plaintiff's original Complaint based upon Plaintiff's counsel's failure to comply with the Court's local rules which require that counsel be admitted to this Court to practice before it. Plaintiff's counsel, a member of the Alabama bar, was not a member of the Georgia bar and never sought admission, *pro hac vice* or otherwise, to practice before this Court. Moreover, counsel failed to take advantage of the Court's several opportunities to associate local counsel. The Court consequently dismissed Plaintiff's Complaint without prejudice for failing to comply with the Court's Order and local rules.

expiration of the statute of limitations.

DISCUSSION

The Court has federal question jurisdiction over this case based upon Plaintiff Bynam's claims under Title VII and the ADA. *See* 28 U.S.C. § 1331. Both of these claims must be brought within ninety days following the receipt by Plaintiff of a Notice of Right to Sue. *See* 42 U.S.C. § 2000e-5(f) (1). Defendant seeks judgment on the pleadings based upon the fact that Plaintiff did not file his Complaint in this case within the applicable ninety-day statute of limitations period. Plaintiff Bynam argues that the present motion should be denied because his original Complaint was timely filed, and the statute of limitations should be tolled during the pendency of that action.

The present suit was clearly filed outside of the ninety-day statute of limitations period. The Plaintiff filed his original suit on September 24, 2001, the very last day of

the ninety-day limitations period. He refiled the above captioned case on September 4, 2002, almost one year after the statute of limitations had expired. Accordingly, it is clear that his federal law claims are untimely. Moreover, "[t]he fact that dismissal of an earlier suit was without prejudice does not authorize a subsequent suit brought outside of the otherwise binding period of limitations." *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11~ Cir. 1982).

Plaintiff, relying upon *Armstrong v. Martin Marietta Corp.*, 93 F.3d 1505 ($_{11}$th Cir. 1996), argues that the statute of limitations should be tolled during the pendency of his original suit. Unfortunately for Plaintiff, even if the statute of limitations were tolled, his claim would still be time-barred because he did not file his claim within the time remaining on the ninety-day limitation period. Plaintiff chose to file his original suit on the very last day of the ninety-day limitation period. Therefore, there was no time

left to toll during the pendency of that suit. Accordingly, when his Complaint was dismissed, he had no time left on the federal limitations period within which to file his federal claims. Tolling does not start the limitations period anew but simply suspends the running of the limitations period during the pendency of the tolling event. *See United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (highlighting the application of this principle in equitable tolling situations). Since no additional time was left at the conclusion of the tolling event, the tolling does not rescue Plaintiff's federal law claims in this case.[3]

Even if tolling could help Plaintiff, the Court finds that the doctrine of equitable tolling should not apply in this

---

3 The Court recognizes that this result in effect made the Court's dismissal of Plaintiff's original Complaint *without prejudice* a dismissal *with prejudice* at least as to Plaintiff's federal law claims. While this result may seem harsh, the Court notes that Plaintiff had ample opportunity to avoid the original dismissal and also had recourse to pursue an appeal of that order, which Plaintiff chose not to do.

case. Equitable tolling is available in employment discrimination cases if the facts support its application. *See Goldsmith v. City of Atmore*, 996 F.2d 1155, 1161 (11th Cir. 1993) (citing *Suarez v. Little Havana Activities*, 721 F.2d 338, 340 (11th Cir. 1983)) (noting ninety-day period is subject to equitable tolling). However, such tolling should be used sparingly. "Equitable tolling may be justified where the plaintiff actively pursued judicial remedies by filing a defective pleading within the statutory period, or where the plaintiff has been misled by the court into believing that a filing was effective." *Id.* (internal citations omitted)

The Court finds that Plaintiff did not properly pursue his original action, which was ultimately dismissed because of failure of Plaintiff's counsel to follow the Court's rules and obey its orders. The Court also finds that although the Court's dismissal was stated to be without prejudice, Plaintiff could not have been misled by that Order because at the time

it was entered Plaintiff should have known that the statute of limitations had already expired, and Plaintiff made no effort to oppose the dismissal or seek its reversal on appeal. Therefore, even if the tolling of the statute of limitations during the pendency of the original case could rescue Plaintiff's time-barred federal claims, the Court finds that equitable tolling should not apply under the facts of this case.

In addition to his claims for employment discrimination, Plaintiff Bynam also asserts state law claims for retaliation for filing a workers' compensation claim and intentional infliction of emotional distress. Having granted Defendant Intermet judgment on the pleadings as to Plaintiff Bynam's federal claims, the Court declines to exercise supplemental jurisdiction over these claims. 28 U.S.C. § 1367(c) (3).

CONCLUSION

The Court grants Defendant's Motion for Judgment

on the Pleadings as to Plaintiff's federal law claims, which are dismissed with prejudice. The Court declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims, which are dismissed without prejudice.

IT IS SO ORDERED, this 10th day of September, 2003.

/s/ CLAY D. LAND
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No.03-15051

Non-Argument Calendar

D.C. Docket No. 02-00139-CV-1-CDL-4

RICKY LEE BYNAM,

Plaintiff-Appellant,

versus

INTERMET MACHINING,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

(March 5, 2004)

Before TJOFLAT, BIRCH and MARCUS, Circuit Judges.

PER CURIAM:

Ricky Lee Bynam ("Bynam") appeals the district

court's order granting defendant Intermet Machining's ("Intermet") motion for judgment on the pleadings in his employment discrimination action. The district court ruled that Bynam's two federal claims against Intermet were untimely and then declined to exercise supplemental jurisdiction over his state-law claims. WE AFFIRM.

I. BACKGROUND

Bynam was employed as a machinist for Intermet and was injured in a workplace accident in May of 1999. He filed a claim with the State of Georgia Board of Workers' Compensation, and on 4 November 1999, while this claim was pending, Intermet terminated his employment. Bynam filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), alleging that he was fired because of his race and his disability. He received a "Notice of Right to Sue" letter from the EEOC on *25* June 2001.

Upon receipt of this letter, Bynam had 90 days to

initiate his civil lawsuit pursuant to 42 U.S.C. § 2000e-5(f)(l). On 24 September 2001,[1] Bynam filed a complaint in the District Court for the Middle District of Georgia alleging two federal claims and, two state-law claims: (1) discharge based on race in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq.; (2) disc. rge based on disability in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111 et seq.; (3) retaliatory discharge; and (4) intentional infliction of emotional distress. This complaint ("Bynam I") was dismissed on 22 August 2002 after Bynam's counsel failed to comply with the local rules requiring him to be admitted to practice in the Middle District of Georgia bar or to associate

---

1 24 September 2001 marked the 91st day after Bynam received his EEOC letter. Because 23 September was a Sunday, however, Bynam' s complaint filed on 24 September was timely filed under Rule 6(a) of the Federal Rules of Civil Procedure.

with local counsel. Bynam did not appeal. Instead, on 4 September 2002, Bynam filed a second complaint ("Bynam II") alleging the same four claims.

Intermet filed a motion for judgment on the pleadings as to the two federal claims, pursuant to Federal RUle of Civil Pro~edure 12(c), on the ground that the statute of limitations for those claims had expired. Bynam, on the other hand, argued that Intermet's motion should be denied because his complaint in Bynam I was timely filed and the Bynam II complaint was filed within 30 days following the dismissal of Bynam I.

The district court concluded that the Bynam II complaint was filed outside the 90-day statute of limitations period imposed under 42 U.S.C. § 2000e-5(f)(1). Accordingly, the district court granted Intermet's motion for judgment on the pleadings—dismissing with prejudice the federal claims—and then declined to exercise supplemental

jurisdiction over Bynam's state-law claims. Bynam now appeals.

II. DISCUSSION

On appeal, Bynam argues (a) that his federal claims should be considered as timely filed and (b) the district court should have exercised supplemental jurisdiction over his state-law claims. We discuss these issues in turn.

A. Judgment on the Pleadings

We review de novo the grant of a motion for judgment on the pleadings. Cannonv. City of West Palm Beach, 250 F.3d 1299, 1301 (llth Cir. 2001). The district court dismissed Bynam' s complaint as untimely and also declined to apply the doctrine of equitable tolling. We address each issue in turn.

1. Bynam's Untimely Complaint

Under Title VII and the ADA, after receiving the EEOC's "Right to Sue" letter, Bynam had 90 days to initiate a civil

action. 42 U.S.C. §§ 2000e5-(f)(1), 12117(a); Santini v. Cleveland Clinic Florida, 232 F.3d 823, 825 (11th Cir. 2000) (per curiam); Zillyeftev. Capital One Financial Corp., 179 F.3d 1337, 1339 (11th Cir. 1999). The parties do not dispute that Bynam' s complaint in Bynam I, which was dismissed without prejudice, was timely filed; they dispute whether the complaint in Bynam II, which was dismissed with prejudice as to the federal claims, should be considered as similarly timely filed.

Under our precedent, "[t]he fact that dismissal of an earlier suit was without prejudice does not authorize a subsequent suit brought outside of the otherwise binding period of limitations." Stein v. Reynolds Sec.. Inc., 667 F.2d 33, 34 (11th Cir. 1982). Because Bynam II was filed almost one year after the statute of limitations had expired, the district court correctly concluded that Bynam's two federal claims were untimely.

Bynam argues, however, relying on Johnson v. Ry. Express Agency, Inc., 489 F.2d *525* (6th Cir. 1973), aff'd, 421 U.S. 454, 95 S. Ct. 1716 (1975), and Armstrong v. Martin Marietta Corp., 138 F.3d 1374 (11th Cir. 1998) (en banc), that his complaint in Bynam II should be considered as timely because it was filed within 30 days of the dismissal of the complaint in Bynam I. Bynam misreads the Sixth Circuit's analysis in Johnson and his reliance on Armstrong is similarly misplaced. In Johnson, the plaintiff—Johnson—filed an employment discrimination action alleging violations under Title VII and state law. 489 F.2d at 526. Prior to trial, Johnson's appointed counsel withdrew with permission, and the district court wrote a letter to Johnson providing him 30 days to obtain new counsel or have his case dismissed without prejudice. Id. at 527. Johnson did not obtain new counsel within that time, and the court dismissed his case without prejudice. Id. When

Johnson filed a second complaint, three months after the dismissal of the original complaint, the district court dismissed certain claims on the grounds of res iudicata and ruled that Johnson's failure to refile a lawsuit within 30 days from the date of dismissal resulted in a failure to comply with the 30-day filing requirement.[2] Id. When Johnson argued that he was not required to file suit within 30 days after the dismissal without prejudice because he fulfilled the statutory requirement of filing his initial complaint within 30 days of receiving his right-to-sue letter, the Sixth Circuit expressly disagreed. Id. at 528. Thus, Johnson is inapposite to this case.

Bynam's reliance on Armstrong is similarly misplaced. In that case, we determined that the 90-day

---

2 The 30-day filing requirement in Johnson was prescribed under 42 U.S.C. § 2000e-5(e)(1). In contrast, the filing period applicable to the Bynam II complaint is 90 days pursuant to **42** U.S.C. § 2000e-5(f)(l).

period for filing a civil action under the Age Discrimination in Employment Act was tolled for individual members of a class until the district court entered an interlocutory order denying class certification. 138 F.3d at 1378. We also concluded that the limitations period remained equitably tolled for four appellants who had been affirmatively misinformed by the EEOC as to the statute of limitations, but was not equitably tolled as to other appellants who did not receive affirmative misinformation. Id. at 1393. Bynam, however, is neither a member of a class nor was he misinformed by the EEOC (or the district court) about the statutory filing period. Thus, Armstrong is also inapposite to this case, and the district court correctly concluded that the federal claims contained in the Bynam II complaint were untimely filed.

2. The Doctrine of Equitable Tolling

The 90-day statute of limitations rule applicable to

actions arising under Title VII and the ADA is not jurisdictional. Jackson v. Seaboard Coast Line R.R. Co., 678 F.2d 992, 1007 (11th Cir. 1982). As a result, the limitations period is subject to equitable tolling. Suarez v. Little Havana Activities, 721 F.2d 338, 340 (11th Cir. 1983) (per curiam). "Equitable tolling may be justified where the plaintiff actively pursued judicial remedies by filing a defective pleading within the statutory period, or where the plaintiff has been misled by the court into believing that a filing was effective." Goldsmith v. City of Atmore, 996 F.2d *1155*, 1161 (11th Cir. 1993). Neither situation is present in this case. In Goldsmith, we held that the plaintiff's complaint, filed on the 94th day after she received her EEOC letter, was timely filed. 996 F.2d at 1161. Instead of a complaint, the plaintiff originally filed her EEOC letter and a memorandum outlining a summary of the allegations against her employer. Id. at *1158*. The district court ordered her to file a formal

complaint by a certain date—which was 94 days after she received her EEOC letter—and the plaintiff complied. Id. Even though the plaintiff's complaint was filed outside of the 90-day requirement, we determined that it should be considered as timely filed because the plaintiff "was led by the district court to believe that her defective filing was effective for purposes of the 90-day rule." Id. at 1161. Thus, we concluded that the 90-day limitations period was tolled until the date the plaintiff filed her formal complaint. Id.

In contrast to the situation in Goldsmith, Bynam's complaint in Bynam I was not defective. Rather, his counsel was not authorized under the local rules to represent Bynam in federal district court. The district court expressly notified Bynam that he was required to comply with the rules by a certain date or face dismissal of his civil action. When counsel failed to comply, the court dismissed Bynam's case. Therefore, the district court correctly concluded that Bynam

failed to properly pursue his original action. Moreover, Bynam was not misled by the district court into believing that he could file his complaint in Bynam II outside the 90-day statute of limitations. The district court again correctly concluded that Bynam should have known that the statute of limitations had already expired when Bynam I was subject to dismissal, and he made no effort to oppose the dismissal of Bynam I or seek its, reversal on appeal. Thus, Bynam has not demonstrated that the doctrine of equitable tolling should apply to this case.[3]

B. Supplemental Jurisdiction

A decision under 28 U.S.C. § 1367(c) with respect to the retention of supplemental jurisdiction over state law

---

3 We note also that, even if the doctrine of equitable tolling could rescue Bynam's claims, those claims would still be time-barred because he filed his complaint on the very last day of the 90-day limitation period—24 September 2001. Thus, there is no time left to toll during the pendency of that suit.

claims is reviewed for abuse of discretion. Shotz v. City of Plantation, 334 F.3d 1161, 1185 (11th Cir. 2003).

28 U.S.C. § 1367 dictates that the district court may decline to exercise supplemental jurisdiction over a claim if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). In this case, the district court dismissed Bynam's two federal claims over which it had original jurisdiction. Because section 1367 allows the district court to then decline supplemental jurisdiction over adjacent state-law claims, the court's decision to decline such jurisdiction was not an abuse of discretion.

III. CONCLUSION

On appeal, Bynam alleged that the federal claims in his complaint in Bynam II should not have been dismissed as untimely and that the district court should have exercised supplemental jurisdiction over his state-law claims. We

conclude that (1) the district court properly determined that Bynam's complaint was filed outside the 90-day statute of limitations period, thus barring his federal claims; (2) equitable tolling of the 90-day limitations period is not warranted in this case; and (3) the district court acted in accordance with 28 U.S.C. § 1367 in declining to exercise supplemental jurisdiction over the state law claims after dismissing the federal claims over which it had original jurisdiction. Accordingly, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-15051-JJ

RICKY LEE BYNAM,

Plaintiff-Appellant,

versus

INTERMET MACHINING,

Defendants-Appellees.

- -

On Appeal from the United States District Court for the Middle District of Georgia

- -

ON PETITION (S) FOR REHEARING AND PETITION (S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19 ___, ____ F. 2d _____).

Before: TJOFLAT, BIRCH and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing EN BANC and DENIED.